United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2029

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To be argued by
WILLIAM F. DOW, III

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-2029

IN RE:

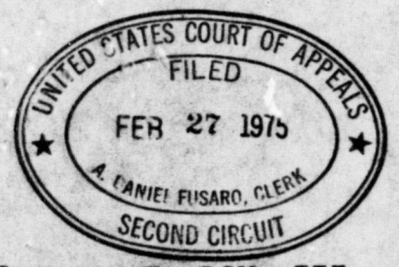
ELLEN GRUSSE

MARIE THERESA TURGEON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE



PETER C. DORSEY
United States Attorney
District of Connecticut

United States Court House
New Haven, Connecticut 06510

WILLIAM F. DOW, III
Assistant United States Attorney

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Questions Presented

1. Did the court err in finding Appellants in contempt for their refusal to comply with a court order to testify before a grand jury after they had been granted use immunity and after their claims of illegal electronic surveillance had been categorically denied by affidavit and by testimony stating that the Special Agent of the Federal Bureau of Investigation supervising the investigation under consideration by the grand jury had repeatedly represented that there had been no electronic surveillance or interception of wire or oral communications in connection with that investigation?

2. Did the court err in compelling the witnesses' testimony over the claim of abuse of the grand jury process where the transcript of the proceedings before the grand jury clearly indicates that the purpose of the grand jury's investigation was to inquire into the possibility of violations of federal laws by individuals who may have aided and assisted known fugitives?

3. When applying to the District Court for an order to compel an immunized witness to testify is the Government required to show that the internal procedures and guidelines of the Department of Justice regarding immunity grants have been followed?

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BRIEF FOR THE APPELLEE

Statement of the Case

This is an appeal from an order of the District Court for the District of Connecticut (Newman, J.) adjudicating Appellants in contempt of court pursuant to Title 28 United States Code §1826(a) for their refusal to testify before a federal grand jury investigating possible violations of federal laws in Connecticut. Appellants are grand jury witnesses who were found in contempt after they had been granted "use" immunity and ordered to testify pursuant to 18 USC §6002-3, and after they had been further ordered by the court to respond to particular questions before the grand jury.

The witnesses claim that they should not have been found in contempt for they had "just cause" for refusing to comply with the court's order to testify. From oral arguments and from pleadings filed with the District Court and this Court in their application for stay, it appears the Appellants' claim that the Government's denial of electronic surveillance was inadequate; that there was an abuse of the grand jury process and thus the District Court erroneously ordered the witnesses to testify; that the Government failed to follow the procedures and guidelines of the Department of Justice in obtaining authorization to grant use immunity; that the constitution of the federal grand jury in the District of Connecticut is constitutionally infirm because it under-represents minority groups and women; and, that use immunity is not co-extensive with Appellants' Fifth Amendment privilege. As more fully set forth below, these claims were raised in the District Court and denied by Judge Newman.

Statement of Facts

A federal grand jury convened in New Haven on January 28, 1975, and began an investigation into possible criminal activities in the District of Connecticut. This investigation focused on the whereabouts, activities and associations of two fugitives, Susan Edith Saxe and Katherine Ann Power. Those individuals have been charged with the 1970 armed robbery of a Boston bank during which a police officer was shot and killed. It is believed that Saxe and Power, using the aliases Lena Paley and May Kelly, respectively,

resided for a period of time in Connecticut, befriended individuals in the state, disclosed their true identities to these individuals and enlisted and received their aid and assistance. (Witnesses Exhibit #1 at February 19 hearing in District Court.)

Ellen Grusse and Marie Theresa Turgeon were subpoenaed as witnesses before the grand jury in New Haven. Through counsel, the witnesses filed several motions in open court asking Judge Newman to continue the matter, quash the subpoenaes and/or specially instruct the grand jury. The court heard argument on the motions from counsel for the witnesses and denied them. Each witness then appeared before the grand jury, was advised of her rights, allowed to consult with counsel after each question, and refused to testify on Fifth Amendment grounds. Counsel for the witnesses were advised that authorization for a grant of "use" immunity would be sought from the Department of Justice and an application made to the District Court for an order to testify.

Both witnesses reappeared on February 13, 1975,pursuant to subpoenaes.[1/] The United States Attorney at that time filed with the court a motion requesting an order to testify for both

1/Ms. Turgeon had been personally served with a subpoena to testify and a subpoena duces tecum for herself and identical subpoenaes for Ms. Grusse. Ms. Grusse nevertheless appeared on February 13 and was personally served with a subpoena. The court reserved decision on the motion to quash the subpoena duces tecum served Ms. Turgeon at the suggestion of the Government.

witnesses pursuant to 18 USC §6002-3. In its motion, the United States of America represented that each witness had been called before the grand jury on January 28 and had refused to testify on Fifth Amendment grounds, that in his opinion the testimony of each "may be necessary to the public interest", and that the application for the order was authorized by the Acting Assistant Attorney General of the Criminal Division. A supporting memorandum was also filed.

The witnesses, through counsel, again filed numerous motions in open court and presented extensive oral argument as well. The witnesses sought to quash the subpoenaes; to obtain a protective order regarding the evidence then in the Government's possession; and to restrain agents of the Federal Bureau of Investigation from "harassing" families of the witnesses. These motions were denied and each witness reappeared before the grand jury and again refused to testify.[2/] The grand jury then voted to authorize the Assistant United States Attorney to seek from the court an order to compel testimony as to each witness.

On the following day, February 14, 1975, the Government filed a motion requesting that the court issue such an order

2/ The interrogation of the witnesses before the grand jury was read into the record by the official reporter of the grand jury and is a part of the record on appeal. (Proceedings of February 14, 1975, pp. 4-22.)

and in support of that motion called the grand jury stenographer who read the interrogation of the witnesses into the record. Counsel for the witnesses articulated his objections to the issuance of an Order to Compel (Feb. 14, 1975 22-34). The court granted the motion and advised the witnesses that the order would issue and informed them of the consequences of non-compliance. After receiving the order, each witness reappeared before the grand jury and again refused to answer the questions set forth in the order. The grand jury then voted to authorize the Assistant United States Attorney to apply for an order to show cause why each of the witnesses should not be held in contempt. When the witnesses and counsel reappeared before Judge Newman on that same afternoon, the Government orally applied for an order to show cause and a hearing was set for Tuesday, February 18, 1975.

On Tuesday, Appellants filed extensive pleadings alleging that they, their counsel, counsel's associates and other counsel had been the subjects of illegal electronic surveillance. Supporting affidavits and memoranda of law were also filed on behalf of the witnesses. Some of these pleadings were served on the Government the previous evening and others were served in court. The Government submitted an affidavit of the Assistant United States Attorney indicating that there had been no electronic surveillance nor interception of oral or wire communications in connection with the grand jury's investigation. The Assistant was

then called as a witness by Appellants and examined by counsel. (Proceedings of February 18, 1975.) The Assistant testified that he had spoken on numerous occasions with Special Agent Robert Hawley, the Federal Bureau of Investigation supervisor who was coordinating the investigation of the matter before the grand jury and had asked Hawley whether there had been any interception of oral or wire communications in connection with the investigation or whether any of the questions put to the witnesses were derived from any such interception. (Feb. 18, 1975 3, 5, 6, 11, 15, 16.) The response in each instance was an absolute denial. The court then entertained oral argument on the claimed inadequacy of this denial; the alleged improper constitution of the grand jury; the alleged lack of compliance with Department of Justice regulations in securing the authorization; and the claimed inadequacy of use immunity. Judge Newman took the matter under advisement until the following day.

On Wednesday, February 19, 1975, the Government filed under seal affidavits concerning evidence presently available against the witnesses. The witnesses were then adjudicated in contempt pursuant to 28 USC §1826(a) and were remanded to the custody of the United States Marshal until they purged themselves of contempt by responding to the questions propounded them by the grand jury, but no longer than the term of the grand jury which will expire on April 2, 1975.

A request for bail was denied but, Judge Newman stayed execution of the order until noon on February 24. On February 21 Judges Anderson, Mulligan and VanGraafeiland further stayed the order until Wednesday, February 26 and Judges Lumbard, Oakes and Timbers extended the stay to Thursday, February 27, on which date briefs are to be filed and arguments presented to this Court.

ARGUMENT

1. The Government's categorical denial of electronic surveillance by testimony and affidavit was sufficient under the standards established in this Circuit to overcome the witnesses' claim of electronic surveillance of them, their counsel and counsels' associates.

Appellants alleged in the District Court that they, their counsel of record, consulting counsel, and counsels' associates (see Documents No. 15-22, 28) had been subjected to electronic surveillance. They submitted to the District Court vague and conclusory affidavits to that effect on the day of the hearing on the Order to Show Cause. The Government responded to this claim by submission of an affidavit (Document 27) denying any electronic surveillance or interception of oral or wire communications. The Assistant was called as a witness by counsel for the Appellants (Document 2) and testified that he had spoken to the Special Agent supervising the Federal Bureau of Investigation's investigation (who would be in a position to know if there had been electronic surveillance) on numerous occasions, and asked whether there had been <u>any</u> interception of wire or oral communications in connection with the investigation or whether any of the questions posed before the grand jury were derived from such interception. The answer was a categorical denial.

Appellants claim that this denial is insufficient and that this is "just cause" for their non-compliance with the

District Court's order. The Government submits that its denial of electronic surveillance - both by affidavit and by testimony - fully complies with the standards articulated in the decisions of this Court.

Appellant relies heavily on the decision of this Court in Toscanino v. United States, 500 F.2d 267 (1974) for the proposition that the Government is required under 18 USC 3504(a) to affirm or deny the existence of electronic surveillance by affidavit. In Toscanino this Court cited four cases in support of its holding. An examination of those decisions reveals that in every case the appellate court approved an affidavit from the Government almost identical to the one submitted to the District Court in the case at bar. Beverly v. United States, 468 F.2d 732, footnote 4 and discussion at 750 (5th Cir. 1972); In Re Horn, 458 F.2d 468, footnote 3 and discussion at 470-471 (3rd Cir. 1972); In Re Grumbles, 453 F.2d 119, footnote 4, discussion at 122 (3rd Cir. 1971), cert. denied, 406 U.S. 932 (1971); In Re Marx, 451 F.2d 466, footnote 2 and discussion at 122 (1st Cir. 1971).

Appellant also relies on United States v. Vielguth, 502 F.2d 1257 (9th Cir. 1974) and asserts that the Government's denial here must be judged against the standards of that decision. In Vielguth the appellate court clearly and plainly stated that the point at issue was whether the appellants had established a claim in the trial court sufficient to compel a response by the Government. The adequacy of the Government's response was not

at issue. The Court said:

> We therefore hold that appellant's affidavits were sufficient to require the government to affirm or deny the occurrence of the alleged surveillance. Since the district court did not reach the question of the adequacy of the government's response, that issue is not before us and we do not consider it.
>
> 502 F.2d 1257 at 1261
> (Emphasis supplied.)

See also In Re Weir, 495 F.2d 879 (9th Cir. 1974).

Another consideration must be weighed in balancing the issues presented in this case. Appellants are grand jury witnesses, not trial witnesses or defendants, and their defiance of the District Court's order has effectively crippled the investigation of that grand jury. The operation of the federal criminal justice system is almost entirely dependent on the mechanism of the grand jury to investigate possible violations of the law and to indict those believed to have broken the law:

> Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any

particular individual will be found properly subject to an accusation of crime."

> The scope of the grand jury's powers reflects its special role in insuring fair and effective law enforcement. A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused in adjudicated. Rather, it is an ex parte investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person. The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged.
>
> United States v. Calandra
> 414 U.S. 338, 343-44
> (Citations omitted.)

Courts have spoken strongly against impediments to its deliberate efficient operation. Costello v. United States, 350 U.S. 359 (1956); Gelbard v. United States, 408 U.S. 41, 70 (1972) (Justice White concurring); Calandra, supra; Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).

The problems posed by a recalcitrant grand jury witness who, though immunized, refuses to testify has been vividly described by Judge Chambers in his concurring opinion in In Re Weir:

> All over the country there are efforts today to break down the use of the grand jury as an effective body. The method used is that one keeps it sitting out on a side track while the crew leaves the train and goes off to fight one brush fire after another. One heckles the prosecutor about electronic eavesdropping. One complains that the prosecutor

> has not produced adequate proof that each of the million or more government employees who might have tapped a person's telephone has not done so.
>
> 495 F.2d at 882

This Court and others have spoken unequivocally of their disfavor of the disruption of the orderly processes of the grand jury by allegations of electronic surveillance. In In Re Persico, 491 F.2d 1156 (2nd Cir. 1974), this Court held that an immunized grand jury witness is not entitled to a suppression hearing by the mere allegation of illegal electronic surveillance. A hearing pursuant to 18 USC 2518(1)(e) is appropriate only where the Government acknowledges illegal surveillance, an absence of a court order on a prior adjudication of illegality. Certainly none of these considerations is at play here. The Court, relying on Gelbard, supra; Calandra, supra; and United States v. Dionisio, 410 U.S. 1 (1973), clearly ruled out extensive litigation of the electronic surveillance issue by an immunized grand jury witness:

> The contempt mechanism employed here to coerce testimony is so intimately connected with the grand jury proceedings in which the testimony is desired as to be really a part of those proceedings. Obviously, any expansion of the breadth of inquiry permissible in a contemporaneous contempt proceeding initiated because of the recalcitrance of a grand jury witness necessarily inhibits the smooth functioning and efficient operation of that grand jury.
>
> 491 F.2d at 1162

A similar problem was addressed by this Court in its more recent decision In Re Vigorito, 499 F.2d 1351 (2nd Cir. 1974) where Judge Hays spoke of the dangers that the "grand jury's inquiry would move at a snail's pace" if even non-witnesses were allowed to litigate the issues of illegal electronic surveillance. 499 F.2d 1354. Lastly, a recent decision of the First Circuit, In Re Mintzer, ____ F.2d ____ (1st Cir. 1974) 16 Cr.L. 2361 (decided 12/26/74) rejected a claim by grand jury witnesses who alleged they had been overheard and requested the Government search federal and state records. There the court said that all that can be required is that those conducting the grand jury proceeding affirm that they have no knowledge and have not in any way employed electronic surveillance in formulating questions to be posed to the witness. The policies articulated in Calandra, the Court said, argued against a broad inquiry into alleged electronic surveillance of grand jury witnesses.

In Calandra, the Supreme Court held that the exclusionary rule would not be extended to grand jury proceedings because of the "potential injury to the historic role and functions of the grand jury". Suppression hearings, the Court held

> would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective. The probable result would be "protracted interruption of grand jury proceedings".....effectively transforming

them into preliminary trials on the merits. In some cases the delay might be fatal to the enforcement of criminal law.

414 U.S. at 349-50

(Citations omitted, emphasis supplied.)

The Court also reiterated its earlier considerations in Dionisio:

> Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws.
>
> United States v. Dionisio
> 410 U.S. 1, 17 (1973).

Those same considerations apply to this case and fully support the adjudication of contempt by the District Court.

2. The investigation of the grand jury into possible violations of federal laws in the District of Connecticut in connection with the activities of two fugitives did not constitute an abuse of the grand jury and the court did not err in compelling the witnesses to testify.

Appellants claim that the inquiry of this grand jury is improper, alleging that its purpose is to secure evidence in already-indicted cases and only to assist the Federal Bureau of Investigation to accumulate information in its search for two fugitives who are on its most-wanted list.

As noted above, the grand jury's investigation is focused on the activities of Susan Edith Saxe and Katherine Ann Power, who have been charged with the 1970 robbery of a Boston bank which involved the theft of approximately $26,000 and the killing of a policeman. Saxe and Power, using the aliases Lena Paley and May Kelly, respectively, are believed to have resided in the State of Connecticut for approximately two years. (See Witnesses Exhibit No. 1). During that period it is believed that they enlisted and received the assistance of other individuals to whom they had revealed their true identities. (Proceedings of February 14 p.8). Those individuals may have violated federal laws in rendering assistance to Saxe and Power.

It is clear that the grand jury has the power to investigate possible violations of law. Its functions are premised on the well-established common-law principle that "the public has a right to every man's evidence".

> Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime". Blair v. United States, 250 U.S. 273, 282 (1919).
>
> Branzburg v. United States
> 408 U.S. 665,688

See, United States v. Callandra, 414 U.S. 338, 342-347; Costello v. United States, 350 U.S. 359, 361-362 (1956); Blair v. United States, 250 U.S. 273, 279-283 (1919).

It is clear on this record that the grand jury was fulfilling its historic function of investigating criminal activity. The purpose of the investigation was clearly spelled out to the witnesses when they appeared:

> Let me give you a little further information about what the scope of this inquiry by the grand jury is. Susan Edith Saxe, also known as Lena Paley, and Katherine Ann Power, also known as May Kelly, are charged with participating in a bank robbery in the State of Massachusetts in 1970, during the course of which a man's life was lost. It is believed that either or both Power and Saxe lived for a period of time in Connecticut, and that you knew them, and that you may have information as to other people who knew them who might have assisted or aided them while they were in this State, and might otherwise be guilty of some criminal involvement with them. That is the purpose of this grand jury inquiry.
>
> (February 14, 1975 p.8)

When you appeared last time, I indicated to you that this is a federal grand jury sitting in New Haven, investigating possible violations of federal laws in the State of Connecticut.

More specifically, the investigation concerning two fugitives, one by the true name of Katherine Ann Power, who uses the alias May Kelly; and a second, Susan Edith Saxe, who uses the alias Lena Paley. The investigation has revealed that there is a possibility they lived in Connecticut for a certain period of time over the past number of years. This grand jury is interested in investigating possible violations of federal criminal laws in terms of, but not limited to, violation of the harboring statute: that is, harboring a known felon -- it would be 18 U.S.C. 1071, and the accessory after the fact provision of the United States Code.

(February 14, 1975 pp.14-15)

And, again,

The Foreman: Could I ask one question? Do you understand the description of the reason that you are being called here, that Attorney Dow just stated? Do you understand that the purpose of this grand jury is to investigate a crime that was committed in Boston in 1970, and your possible knowledge of any of -- of any of the facts concerning the whereabouts of the people, the perpetrators of the crime? Do you understand that is the reason why you are being asked to be here?

The Witness : To answer that, I would really -- I would like to talk to my attorney, to answer that question.

Mr. Dow: Let me amplify that to a degree, if I could, Mr. Foreman, to indicate that the scope of the inquiry goes beyond the crime itself that was committed in Boston, but activities of the individuals believed to have committed those crimes in the State of Connecticut, such as involving -- such as possible assistance to those suspects by other individuals in the State.

Is that your understanding?

The Foreman: That's right.

(Emphasis supplied.)

(February 14, 1975 pp. 20-21)

Furthermore, the questions propounded to the witnesses are consistent with those purposes. (See generally, February 14, 1975, pp. 4-22).

Appellants' claim that the grand jury is preparing an already-indicted case for trial, even if true, does not constitute an abuse of the grand jury. While it is often argued that a grand jury cannot contiinue to hear evidence in a case in which it has already returned an indictment, the cases most often cited to support that proposition do not do so. In United States v. Pack, 150 F.Supp. 262 (D.C. Delaware, 1957) the defendant moved to quash a grand jury subpoena alleging that the Government intended to use his testimony for discovery and preservation of testimony in cases already indicted by another grand jury. The defendant had been indicted twice in 1952 and twice in 1953 for filing false tax returns. Motions to suppress evidence in all four cases were granted and the cases were dismissed for want of prosecution on February 14, 1957. The subpoena at issue was served on January 30, 1957, and referred to the four pending cases. The Government represented that its purpose was to preserve testimony for use at trial and "to obtain evidence in connection with offenses other than those embraced within the enumerated indictments and in furtherance of the general investigatory powers of the grand jury as to such offenses". 150 F.Supp. 264. The Court (Rodney, J.) concluded that if the purpose

were solely to preserve testimony, the motion to quash would be granted for "I have seen no case where a grand jury not investigating any criminal activity and not looking toward an indictment to be found by it could take testimony merely for the purpose of preserving such testimony for use in a criminal trial under an indictment by a former grand jury". Id. (Emphasis supplied.) Nevertheless, because the Government represented that the evidence sought was in furtherance of investigation of other possible offenses, the motion to quash would be denied:

> This Court has neither the desire nor the right to interfere with these functions. They are the basic functions of the grand jury.
>
> Id. at 264.

In United States v. Fisher, 455 F.2d 1101 (2d. Cir. 1971), on appeal from a bank robbery conviction, the appellant alleged that the testimony of a trial witness had been "frozen" by having him appear before a grand jury after an indictment had been returned and after the investigation of that case and other bank robberies had been terminated. The Government agreed at argument that such was the case and this Court, in dicta, stated that the Government's conduct "cannot be justified and should not be repeated". 455 F.2d 1105.

Nevertheless, the prevailing cases hold that

> so long as it is not the sole or dominant purpose of the grand jury to discover facts relating to [a] pending indictment, the Court may not interfere with the grand jury investigation.

United States v. George, 444 F.2d 310, 314 (6th Cir. 1971). See In Re Grand Jury Investigation (General Motors Corp.), 32 F.R.D. 175 (1963) at 183-185.

Additionally, one must bear in mind that Saxe and Power are fugitives and have been since 1970. Counsel has found no court decision which would prohibit a grand jury from investigating the whereabouts of fugitives for the sole purpose of achieving their apprehension. By merely remaining fugitives Saxe and Power continue to violate the law 18 USC 1073 and the grand jury certainly can pursue that subject.

Finally, Appellants contend that they were subpoenaed to testify because they refused to talk to agents of the Federal Bureau of Investigation and that others who had been interviewed were not subpoenaed. As Judge Newman indicated in his memorandum of decision (p. 10), testimony can be presented to the grand jury through agents who have investigated the case, thus avoiding the necessity of calling the witnesses themselves. No one is obligated to speak to the Federal Bureau of Investigation or any Government agency; nor is anyone obliged to testify before the grand jury so long as a valid Fifth Amendment claim can be presented. But when immunity is granted,

that person can be compelled to testify and to provide information to assist the grand jury in its investigation for "the public has a right to every man's evidence". The determinative factor is the grand jury and not the Federal Bureau of Investigation.

Finally, Appellants allege that information gathered by the grand jury will be disclosed to unauthorized persons, namely the agents of the Federal Bureau of Investigation. Rule 6(e) of the Federal Rules of Criminal Procedure states

> Disclosure of matters occurring before the grand jury ... may be made to the attorneys for the government for use in the performance of their duties.
>
> (Emphasis supplied.)

Certainly matters relevant to the investigation of the cases before the grand jury can be disclosed to federal agents conducting that investigation. In no sense could such disclosures be considered "unauthorized."

3. When applying to the court for an order compelling an immunized witness to testify, the Government is not required to show that the internal procedures and guidelines of the Department of Justice have been followed.

Appellants contend that when a particular United States Attorney applies to the Department of Justice for authorization to immunize a witness, the Department is required to follow certain procedures and guidelines prior to issuing that authorization,[3/] and the United States Attorney in his application to the court for an order based on that authorization is required to demonstrate that these guidelines have been followed.

This claim has been specifically rejected by the Fifth Circuit in In Re Tierney, 465 F.2d 806 (5th Cir. 1972). There the court said:

> The next assignment of error has to do with the alleged failure of the Department of Justice to follow its own guidelines in applying to the district court for orders to compel appellants to testify. This failure is said to have rendered invalid the orders of the district court to testify and thus the judgments of contempt for disobedience of those orders.
>
> We are unable to discern any merit in the supposed departure from the guidelines. The Acting Assistant Attorney General in charge of the Internal Security Division of the Department of Justice authorized the seeking of the grants of use immunity by the United States Attorney and recited that the testimony sought was necessary and in the public interest. This was in compliance with the statutory requirements. §6003, supra.

3/ Those procedures and guidelines are derived from a letter to Congressman Emanuel Celler as Chairman of the House Committee on the Judiciary from the

> The guidelines on which appellants rely are directed to the handling of requests by United States Attorneys within the Department of Justice for permission to seek orders granting immunity. They are not directed to the procedural or substantive rights of prospective witnesses.
>
> 465 F.2d 813

A similar claim was rejected by Judge Newman in In Re Cardassi, 351 F.Supp. 1080, 1081, fn. 1 (D. Conn. 1972). The Government submits that this claim is without merit.

(Cont.)

3/ then-Deputy Attorney General dated November 30, 1971. Hearings on H.R. 2589, 8829 and 10689, before Subcommittee No. 5 of the House Judiciary Committee, 92d Cong., 1st Sess. (Nov. 10, 1971) pp. 68-71. The letter is not reproduced here but is set forth in Appellants' brief.

4. The composition of the grand jury is not constitutionally infirm as to its representation of women and minorities.

This Court, in United States v. Jenkins, 496 F.2d 57 (2nd Cir. 1974), cert. denied, ____ U.S. ____ (1975), considered the claim advanced here by Appellants regarding underrepresentation of minorities - specifically Blacks - on the venire in this District and concluded that there was no constitutional infirmity in the present structure. Appellants additionally claim, relying on Taylor v. Louisiana, ____ U.S. ____, 16 Cr.L.R. 3033 (January 22, 1975), that women have been systematically excluded from the grand jury. The facts do not substantiate that claim. As noted in Judge Newman's opinion, eight of the twenty members of the grand jury are women. Furthermore, there has been no showing of the systematic exclusion of women which would substantiate a claim of constitutional violations. Certainly there has been no allegation or proffer to prove the type of jury selection system outlawed by the Supreme Court in Taylor.

5. "Use" immunity is co-extensive with the witnesses' Fifth Amendment privilege.

The Supreme Court, in Kastigar v. United States, 406 U.S. 441 (1972), held unequivocally that the "use" immunity provided in 18 USC §6002 is sufficient to protect an individual's Fifth Amendment rights.

Before December 14, 1974, there were two types of immunity under federal statutes. The broadest - transactional immunity - protected a witness from prosecution or subjection to any penalty or forfeiture "for or on account of any transaction, matter or thing concerning which he is compelled .... to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding ... against him." 18 U.S.C. 2514. This provision was repealed on December 14, 1974, and transactional immunity is no longer available. The other, narrower immunity - "use" or "derivative use" immunity - does not absolve the witness from possible prosecution for anything about which he testifies or produces evidence, but guarantees that none of the information produced may be used against him in any criminal case. 18 U.S.C. 6002.

In Kastigar the Court, relying on its earlier decision in Murphy v. Waterfront Commission, 378 U.S. 52, concluded that a witness testifying under a grant of use immunity is in the same position as if he or she had invoked the Fifth Amendment. Use immunity, the Court held, was constitutional for it was "co-extensive" with the scope of a witness' Fifth Amendment privilege:

> The privilege assures that a citizen is not compelled to incriminate himself by his own testimony. It usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer. [18 USC 6002], which operates after a witness has given incriminatory testimony, affords the same protection by assuring that the compelled testimony can in no way lead to the infliction of criminal penalties. The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources.
>
> 406 U.S. 441, 461

Appellants below have contended that they are close friends who reside together and share a "community of interest" which society wishes to protect from intrusion. Any claim of privilege on this theory finds no support in the law. Cases are legion, for example, where blood relatives living under the same roof have been required to testify against one another at the cost to society of endangering familial relationships.

CONCLUSION

For the foregoing reasons, the United States submits that the Appellants were properly adjudicated in contempt and respectfully urges that the decision of the District Court be affirmed.

Respectfully submitted,

PETER C. DORSEY
United States Attorney
District of Connecticut

United States Court House
New Haven, Connecticut 06510

WILLIAM F. DOW, III
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that a copy of the within and foregoing Brief for the Appellee was hand-delivered this 27th day of February, 1975, to counsel of record for the Appellants.

WILLIAM F. DOW, III
ASSISTANT UNITED STATES ATTORNEY